

Court Practice 1991, Vol. 1 Part 1). If the said Court order for particulars be served within a certain time is not complied with, the Court has the power to order that the action shall stand dismissed or the defence be struck out or the allegation of which particulars were ordered should be struck out from the pleading (see page 313 of the **Supreme Court Practice 1991**, Vol. 1 Part 1).

The defendant contended that striking out paragraph 3 of the statement of defence is a drastic measure and urged the Court to exercise its inherent jurisdiction. From the conduct of the defendant in this case I am of the view that all opportunities were given to the defendant to furnish the particulars as far back as 1992 wherein there was not even a reply to the letter (exhibit 'PCSH 5'). The particulars were not even furnished by way of Form 35. The conduct of the defendant indicates the cavalier attitude that the defendant has taken in respect of the issue on the furnishing of the particulars as ordered by the Court and with the consent of the defendant itself. Though the action to strike out paragraph 3 of the statement of defence would appear to be a drastic measure and unjust, on the contrary there are good grounds put forth by the plaintiff for the Court to do so.

In the circumstances of the case I ordered that paragraph 3 of the statement of defence be struck out with costs to the plaintiff. I did not make any consequential order as it is left to the plaintiff to take further steps as he deems fit.

a PENVEST HOLDINGS (M) SDN. BHD.

v.

YAYASAN PELAJARAN JOHOR

b HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J.
[ORIGINATING SUMMONS NO. 24-183
OF 1990]
19 FEBRUARY 1994

c ***CONTRACT: Agreement for sale and purchase of land - Sale subject to fulfillment of conditions - Failure by purchaser to pay balance of purchase price - Purchaser alleging frustration of contract due to non-performance of conditions - Whether frustration made out - Whether purchaser entitled to return of deposit and damages.***

d ***PRACTICE & PROCEDURE: Application to strike out under O. 18 r. 19 RHC 1980 - Whether plaintiff's action obviously unsustainable.***

The plaintiff and the defendant entered into a agreement (CTK-1) for the sale of lands belonging to the defendant. The agreement was subject to the conditions that:

- e** (1) approval be obtained from the State Authority to remove the restriction in interest on the title; and
(2) approval be obtained from the Foreign Investment Committee for the purchase of the said lands.

f The plaintiff paid 10% of the purchase price as deposit at the time of signing the agreement and the defendant called for the payment of the balance of the purchase price after having satisfied the conditions.

g It was subsequently discovered that the buildings to be erected on the said lands were wrongly described in the original layout plan and the plaintiff requested for and obtained an extension of time to pay the balance purchase price until after the layout plan was amended.

h The plaintiff failed to pay the balance purchase price after the amendment and filed the action seeking declarations, *inter alia*, that they were entitled to the return of the deposit and that the said agreement was void and of no effect and/or that it has been frustrated.

i The defendant applied to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of the High Court 1980.

Held:

[1] CTK-1 is a normal sale and purchase agreement of the said lands. Though neither party was aware of the wrong description on the layout plan, on such discovery CTK-1 did not become unlawful as the parties could still proceed with CTK-1 by applying for the approval of the layout plan from the relevant authority. Once the approval of the relevant authority was obtained CTK-1 became choate and completely effective. The failure of the plaintiff to pay the balance of the purchase price no longer had anything to do with the layout plan of the said lands as the plaintiff's default occurred after the approval of the layout plan.

[2] The conduct of the plaintiff after the approval, by asking for time to pay showed that CTK-1 is capable of performance in fact and in law. The plaintiff could no longer therefore rely on the layout plan as an issue to invoke clause 6 of CTK-1 to say that the agreement had become void and/or frustrated.

[3] As it is clear that the plaintiff was in breach of CTK-1 by failing to pay the balance of the purchase price within the extended periods, the defendant is entitled to repudiate the agreement and forfeit the deposit. It was clear that there are no triable issues of fact and law in this case and the claim of the plaintiff is on the face of it obviously unsustainable and the O. 18 r. 19 application was rightly resorted to by the defendant.

[4] While it is true that the power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power, it is equally the Court's duty to see that a party should not be allowed to proceed with its claim if the cause of action is obviously bad and almost incontestably bad as the facts and the law clearly showed in this case.

[Defendant's application allowed with costs].

Cases referred to:

Kin Nam Development Sdn. Bhd. v. Khaw Daw Yau [1984] 1 MLJ (refd)
Denning v. Edwards [1961] AC 245 (refd)
Ramli bin Zakaria & Ors. v. Government of Malaysia [1982] p. 262 (refd)
Murugesan v. Krishnasamy [1958] MLJ 92 (refd)
Sim Chio Huat v. Wong Teng Fui [1983] 1 MLJ 151 (refd)
Amalgamated Investment & Property Co. Ltd (In liquidation) v. Texas Commerce International Bank Ltd. [1982] 1 OB 84 (refd)

- a Lee Yew Hin v. Kew Lup Piow* [1974] 1 MLJ 114 (refd)
Dyson v. Attorney-General [1911] 1 KB 419 (refd)

Legislation referred to:

Contracts Act 1950, s. 40
 Courts of Judicature Act 1964, s. 68(2)
 Rules of the High Court 1980, O. 18 r. 9, O. 28 r. 8, O. 56 r. 2,

- b For the plaintiff - A. Razak Ahmad; M/s. Abdul Razak Ahmad & Associates*
For the defendant - C.H. Ng; M/s. Leng & Co.

JUDGMENT**c Haidar Bin Mohd Noor J:**

The plaintiff filed the originating summons for, *inter alia*:

- d* 1. A declaration that pursuant to the agreement dated 2 August 1985 especially clause six (6) the plaintiff is entitled to all monies paid to the defendant and to claim all damages and losses incurred by the plaintiff due to the non-performance of the said agreement by the defendant;
- e* 2. A declaration that the said agreement is void and of no effect and/or that it has been frustrated;
3. An order for the payment to the plaintiff of the sum of RM560,000 being refund of the deposit and special damages of RM571,686.92 and general damages to be assessed.

- f* It is supported by the affidavit of Chin Thoi Keong, the director of the plaintiff.

- g* At the hearing of the originating summons, it was agreed by the Counsel for both parties that there is only one issue for the determination of the Court, that is, whether there was frustration and/or non-performance of the agreement (exhibit CTK-1) by the defendant when the plaintiff could not proceed with the intended construction of the shophouses as agreed and which entitled the plaintiff to invoke clause 6 of the agreement (CTK-1). As issues of law are involved, I indicated to Encik A. Razak Counsel for the plaintiff that he needed to properly prepare his submission to assist the Court and he then intimated that he required time to do so and requested for an adjournment and was prepared to pay costs of the adjournment. As Encik Ng, Counsel for the defendant had no objection subject to costs, I adjourned the hearing to 21 February 1993.
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At the continued hearing, Encik A. Razak then submitted that he should have proceeded by way of writ and not originating summons in view of the disputed facts and the necessity of oral evidence. He urged the Court to invoke O. 28 r. 8 of the Rules of the High Court 1980 ("RHC") to convert the originating summons to suit. Quite naturally, Encik Ng objected to the oral application of Encik A. Razak, contending that the facts are not disputed and there is no necessity of oral evidence. However, looking at para 23 of the affidavit of Dato' Hj. Abdul Razak bin Abdullah, on behalf of the defendant (encl. 1) it would seem clear that the defendant itself raised the same procedural issue, that is, "the plaintiff had wrongfully instituted their claim by way of originating summons and the proper mode should be by way of writ of summons". In the circumstances, I allowed the application with costs in the cause and the affidavits to be treated as pleadings and steps be taken for summons for directions.

As indicated by Encik Ng earlier, on the issue of conversion, the defendant subsequently filed a summons in chambers on 2 March 1993 under O. 18 r. 19 of the RHC (encl. 21). It is supported by the affidavit of Dato' Hj. Abdul Razak bin Abdullah. In reply the plaintiff through its director, Chin Thoi Keong deposed that since the conversion of the originating summons to writ of summons was allowed by the Court it implies therefore that there are triable issues and the application of the defendant is frivolous and vexatious and should be dismissed (encl. 22). With respect, this claim of the plaintiff is strictly not correct. I am of the opinion that the defendant is not precluded from filing an O. 18 application even in a suit and the question of whether the defendant succeeds or otherwise is a different issue altogether. The onus is on the defendant to show that there is no cause of action etc. under an O. 18 application.

As agreed and it is quite clear from the prayers by the plaintiff, the issue is whether the agreement (CTK-1) is void and of no effect and/or that it has been frustrated.

The following facts are not disputed.

- (1) By CTK-1, the defendant agreed to sell 28 pieces of land ("the said lands") to the plaintiff for RM5,600,000 and the sale is subject to two conditions as stipulated in clause 3 thereof -
 - (a) approval being obtained by the defendant from the State Authority to

- a* remove the restriction in interest on the title;
- (b) approval being obtained from the Foreign Investment Committee ('FIC') for the purchase of the said lands.
- (2) The plaintiff paid RM560,000 to the defendant as deposit and part payment on the execution of CTK-1, that is, on 2 August 1985.
- (3) By clause 4 of CTK-1, the plaintiff agreed to pay the balance of RM5,040,000 to the defendant within two months from the date of approvals as set out in 1(a) and (b) above.
- (4) The express condition on the title is shoplots (perkedaaian) (see exhibit CTK-Z).
- (5) Both conditions as set out in 1 (a) and (b) above were satisfied, namely -
 - (a) By letter dated 2 October 1985 FIC approved the purchase of the said lands for shoplots (see exhibit D-12).
 - (b) By letter dated 1 December 1985 the State Authority approved the removal of the restriction in interest on the title (see exhibit D-13).
- (6) It was subsequently discovered that the proposed 28 shoplots are, according to Majlis Daerah Kluang Utara ("MDKU") under "market place" as in the original layout plan (see exhibit CTK-4).
- (7) The plaintiff then requested for extension of the two months period for payment of the balance of the purchase price until the layout plan can be amended to "shophouses" instead of "market place".
- (8) With the support of the defendant MDKU approved the amendment of the layout plan from "market place" to "commercial shoplots" on 30 January 1986 (exhibit 'D-3')
- (9) The defendant wrote a letter to the plaintiff requesting for the balance of the purchase price since the approval from MDKU to change the layout plan had been approved (see exhibit 'D-5').
- (10) The defendant sent a reminder to the plaintiff in respect of the balance of the purchase price as all necessary approval has been obtained (see exhibit 'D-6').

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- (11) The plaintiff by letter dated 5 July 1986 wrote to the defendant informing that it will settle the balance of the purchase price soon as it is in the final stage of processing the loan approval (see exhibit 'D-7').
- (12) The defendant by letter dated 1 October 1986 informed the plaintiff that its Board of Directors agreed to give extension of time to 31 December 1986 but reserved the right to take back the said lands and to deal with them accordingly (see exhibit 'D-8').
- (13) The plaintiff wrote a letter dated 12 December 1986 to the defendant making a second request for extension of time up to 31 January 1987 as it is still in the midst of getting the loan (see exhibit 'D-9').
- (14) The defendant wrote a letter dated 11 January 1987 again agreeing to give second extension of time until 31 January 1987 as requested but reserving the right to take back the said lands (see exhibit 'D-10').
- (15) Letter dated 3 March 1987 from the plaintiff's then solicitors to the defendant's then solicitors expressing regrets that the defendant has been unable to convert the said lands within reasonable time and that the plaintiff has no option but to demand back the deposit (see exhibit 'D-11').
- (16) After issuing another notice through its present solicitor, the plaintiff claimed that CTK-1 has become void and/or frustrated as the layout plan was that of a market and not shophouses as agreed. The plaintiff purportedly invoked clause 6 of CTK-1.

When CTK-1 was drafted and executed by both parties, they did not envisage the problem relating to the layout plan of the said lands. However, it is not disputed that this problem was settled subsequently with the full knowledge and consent of the plaintiff. Hence, CTK-1 can no longer be said to be incapable of being performed by the defendant. In fact, from the facts set out by me it seems clear that it was the plaintiff who could not keep to its side of the bargain, that is, by failure to pay the balance of the purchase price as agreed by it after two extensions were given by the defendant for it to do so. In the two extensions given the plaintiff was put to notice of the right of the defendant to take possession of the said lands. In the circumstances, I could not see how the plaintiff claimed that CTK-1

a was void and of no effect and/or frustrated. In dealing with the doctrine of frustration, Salleh Abas CJ (Malaya) (as he then was) stated at p. 258 in *Kin Nam Development Sdn. Bhd. v. Khaw Daw Yau* [1984] 1 MLJ:

b The doctrine of frustration which operates to terminate a contract is of recent origin (see *Taylor v. Caldwell* [1983] 3 B & S 826; 122 ER.309). It occurs in a situation where due to a change of circumstances a contract is rendered legally and physically impossible of performance. The doctrine is an exception to the general rule as to an absolute contract in that a person who specifically undertakes an absolute obligation cannot afterwards claim to be absolved from liability by the fact that his failure to perform the obligation is due to the occurrence of an event over which he has no control. **The doctrine does not apply just because the Promisor's obligation has become, because of change of circumstances, more onerous than what he has contracted for.** The basis of the doctrine is, as stated by Lord Radcliffe in *Davis Contractors Ltd. v. Fareham UDC* [1956] AC 696, 729 to be **"not hardship or inconvenience or material loss", but "such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for"**.

e (emphasis is mine)

f Clearly, on the facts CTK-1 is a normal sale and purchase agreement of the said lands. Though neither party was aware of the layout plan of the said lands as "market place", however, on such discovery CTK-1 did not become unlawful since the parties may still proceed with CTK-1 by applying for the approval of the layout plan to 'shophouses' from MDKU. In *Denning v. Edwards* [1961] AC 245, the Privy Council held that where an agreement was entered into for the sale of the land which was subject to the consent of the Governor, the legal consequences of the agreement was inchoate until the consent was obtained. It became choate and completely effective after it was obtained. In the present case once the approval of the MDKU was obtained CTK-1 became choate and the failure of the plaintiff to pay the balance purchase price no longer had anything to do with the layout plan of the said lands as the plaintiff's default or neglect or breach occurred after MDKU's approval. The conduct of the plaintiff after MDKU's approval by asking for time to pay showed that CTK-1 is capable of performance in fact and in law. The plaintiff could no longer therefore rely

on the layout plan as an issue to invoke clause 6 of CTK-1. Hamid, FJ (as he then was) said in *Ramli bin Zakaria & Ors. v. Government of Malaysia* [1982] at p. 262:

In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

The change of circumstances does not radically change CTK-1 as CTK-1 remains an agreement to purchase the said lands. The layout plan issue does not render the performance of CTK-1 impossible as it was subsequently resolved but may render it slightly more onerous. Only if the approval for layout plan to "shoplots" is rejected by MDKU could the plaintiff rely on frustration (see *Murugesan v. Krishnasamy* [1958] MLJ 92).

The plaintiff by its conduct in asking for two extensions to pay the balance of the purchase price after the layout plan issue was resolved clearly showed that the plaintiff affirmed CTK-1 (see *Sim Chio Huat v. Wong Teng Fui* [1983] 1 MLJ 151).

It would seem clear to me that it was the plaintiff who is in breach of CTK-1 by failing to pay the balance of the purchase price within the extended periods granted by the defendant at the request of the plaintiff. The layout plan issue now relied on by the plaintiff is no longer an issue that can be relied upon by the plaintiff (see *Amalgamated Investment & Property Co. Ltd. (In liquidation) v. Texas Commerce International Bank Ltd.* [1982] 1 QB 84).

It would seem clear to me also that there are no triable issues of fact and law in this case and the claim of the plaintiff is on the face of it obviously unsustainable and the O. 18 application was rightly resorted to by the defendant.

As it is clear that the plaintiff was in breach of CTK-1 by failing to pay the balance of the purchase price within the extended periods the defendant is entitled to forfeit the deposit. Section 40 of the Contracts Act 1950 provides that "when a party to a contract has refused to perform....the promisee may put an end to the contract...". In *Lee Yew Hin v. Kew Lup Piow*

a [1974] 1 MLJ 114 the then Federal Court held that "the appellant had bound himself to pay the balance of the purchase price on 20 November 1967 and as he had failed to do so, he had committed a breach of the contract and the respondent was entitled to repudiate the contract and forfeit the deposit". Similarly, in this case the plaintiff had clearly breached CTK-1 and I ruled that the defendant is entitled to repudiate it and forfeit the deposit. This is clearly no longer a triable issue. The facts and the law are so clear that there is no necessity of oral evidence at all.

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c In the circumstances I allowed the application of the defendant with costs.

The plaintiff applied for further argument in open Court and I granted it accordingly. At the hearing of the further argument Mr. Ng, Counsel for the defendant raised an objection on the ground that O. 56 r. 2 of the RHC has been deleted on 29 July 1993. However, O. 56 r. 2, as amended, is still subject to s. 68 of the Courts of Judicature Act 1964 ("CJA"). Section 68(2) of CJA provides for further argument in respect of an order made by a Judge of the High Court in Chambers and hence the objection, in my view, has no merits.

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e With respect, Encik Razak, Counsel for the plaintiff in the further argument in open Court could not raise any new grounds quite apart from setting out the principles in an O. 18 application. I agree that the power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. However, it is equally the Court's duty to see that a party should not be allowed to proceed with its claim if the cause of action is obviously bad and almost incontestably bad (see *Dyson v. Attorney-General* [1911] 1 KB 419) as the facts and the law clearly showed in this case. In the circumstances, the earlier order I made in chambers in favour of the defendant is affirmed with costs.

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